United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2039

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a corporation; SEABOARD ALLIED MILLING CORPORATION, a corporation,

Plaintiffs-Appellants,

vs.

BETTY FURNESS, Commissioner, Department of Consumer Affairs, City of New York,

Defendant-Appellee.

CIVIL ACTION—ON APPEAL FROM THE FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

SAT BELOW: HON. C. B. MOTLEY, J.U.S.D.C.

Reply Brief of Plaintiffs-Appellants

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REPLY ARGUMENT

POINT I

The District Court erred in granting defendant summary judgment because there existed substantial, unresolved issues of material fact at the time.

Defendant refused to address herself to this question in her answering brief preferring, instead, to dismiss it out of hand with the statement: "There is essentially no dispute as to the facts in this case." (Defendant's Brief ["DB"] 3). If one harbors any doubt as to the existence of substantial, unresolved issues of material fact at the time of defendant's motion for summary judgment, he has only to read the respective 9(g) statements (JA80a, JA83a) and plaintiffs' request for admissions (JA140a) and defendant's response thereto (JA147a).

The principal question of fact was whether in enforcing §833-16.0 against plaintiffs' bags of wheat flours the Department[1] allows for variations from stated-net weight due to the loss of moisture content.[2] In her brief defendant virtually admits the existence of this issue of fact when she states:

> The only arguable issue is whether the Department's use of the table to determine whether the consumer is receiving the true weight of the product, allowing for reasonable variations at the time of sale, is proper [DB24].

Whether the Department allows for variations from stated-net weight due to moisture loss has always been contested.

1. Plaintiffs will continue to employ the abbreviations noted in their earlier brief, *e.g.* Department of Consumer Affairs ["the Department"]; the table at page 8 of Handbook 67 ["the Table"]; §833-16.0 ["the ordinance"].

2. Plaintiffs find puzzling the following statement contained in defendant's brief:

> Plaintiffs do not dispute that in *enforcing* the ordinance, the Department allows for weight variations in hygroscopic food commodities from moisture loss" [DB19].

Clearly this issue was the very heart of the controversy and was certainly not admitted by plaintiffs.

Defendant maintained that the Department does, but in support of this position all she did was submit an affidavit in which she averred that her agents employ the Table to judge the legality of all shortweight bags of flour. She made no attempt to demonstrate the reasonableness or logic of this practice.

Plaintiffs, on the other hand, demonstrated by expert opinion and other proof that, regardless of their intentions, defendant's agents fail to allow for variations in stated-net weight due to moisture loss because they do not employ any administrative procedure or standard which is rationally calculated to discover, measure and assess the legality of these variations. The principle proof submitted by plaintiffs on this issue was the affidavit of Malcolm W. Jensen, the author of Handbook 67 and formerly the chief federal enforcement official in the area of weights and measures. (JA91a). According to Jensen, the Table which the Department's agents employ in all cases was neither designed for nor suited to such indiscriminate use. In Jensen's opinion, it was clear that the Department is misusing the Table.

Defendant did not attempt to controvert the facts or opinions expressed in the Jensen affidavit. In fact, she made no attempt to introduce any evidence to demonstrate the reasonableness of the Department's use of Handbook 67 or its other administrative procedures in this area. This, then, serves to make the following finding by the District Court in its opinion on the motion doubly astounding:

> Defendant . . . could rationally concluded that, ordinarily, weights greater than those indicated on p. 8 of Handbook 67 were unjustified. [JA135a-36a].

Not only did the court below make a finding of fact on a summary judgment motion which, in itself, is improper, but the holding was totally unfounded and contrary to

all evidence of record. If summary judgment were to be granted, clearly it was plaintiffs who were entitled to it, not defendant. Reversal thereof is warranted.

POINT II

Section 833-16.0 and the procedures employed by the Department in the administration and enforcement thereof operate to deny plaintiffs due process of law.

A. *The ordinance is so rigid as to prohibit discrepancies in stated-net weight.*

Defendant contends that the term "true weight" contained in the ordinance is sufficiently broad to allow for both variations from stated-net weight due to loss of moisture content and deviations from stated-net weight due to packaging errors. As proof of this she points to the administrative practices indulged in by the Department. She justifies these practices on the ground that they are in conformity with State and Federal law governing the labeling of packages of hygroscopic commodities. Aside from the fact that the Department's practices are at complete variance with State and Federal law, defendant has failed to demonstrate how, in the enforcement of §833.16.0, resort may be had to regulations promulgated under State and Federal legislation since such is not provided for in the ordinance.

Because the term, "true weight," employed in the ordinance has never been defined it must be accorded its commonly understood meaning—"actual weight"—which, even by implication, cannot be said to allow deviations and variations from stated-net weight. Hence, the ordinance is unconstitutionally rigid and denies plaintiffs due process of law with regard to the marketing of their flours which are hygroscopic substances and are subject to unavoidable variations from stated-net weight due to loss or gain of moisture content.

B. *The Department's all-encompassing use of the Table is improper and unreasonable and denies plaintiffs their right to due process of law*

The argument contained in Point II of defendant's brief illustrates precisely the arbitrary and unreasoning attitude on the part of the Department with which plaintiffs have been confronted throughout the course of this controversy. Time and time again plaintiffs have sought to impress upon the Department the fact that the procedures employed by it in enforcing the ordinance against bags of plaintiffs' flour are unreasonable, only to be met with the attitude that, "because we operate this way it must be correct."

Throughout, defendant has acknowledged that her agents employ the Table to ascertain the legality of *all* shortweight conditions in bags of plaintiffs' flours. At the hearing on the motion and again at the trial, plaintiffs introduced expert opinion and other proofs which demonstrated that the Department's administrative practices regarding the ordinance are improper and unreasonable and represent an obvious misuse of the Table[3] (JA96-96a; JA236a-58a).

Defendant has responded to this by charging that plaintiffs' analysis of the Department's procedures "misses the point" and that "Plaintiffs misconstrue the defendant's application of the federal guidelines [the Table]" (DB24).[4]

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3. At page 19 of her brief defendant mischaracterizes plaintiffs' argument. She states that it is plaintiffs' position that "the table does not make adequate allowance" for weight loss due to evaporation or moisture content. This is incorrect. The Table does not even consider the possibility of variations from stated-net weight due to moisture loss much less make "inadequate" allowance therefor.

4. Throughout her brief defendant refers to Handbook 67 and the Table as the "federal guidelines." This characterization is difficult to understand since they are not part of any Federal statutory or regulatory scheme. They were devised for the use of State and local weights-and-measures officials.

She further states that the procedures in question are "rationally designed" (DB21). However, at no time during the course of this litigation did defendant present any evidence which would lead one to conclude that the Department's procedures, especially the all-encompassing use of the Table, were "rationally designed" or suited for use in assessing shortweight conditions of packages of hygroscopic substances. What little evidence was submitted by defendant did nothing more than show what the Department's practices are. She made no attempt to prove the reasonableness of these practices. It seems that defendant believed their mere existence to be justification enough for such practices thus obviating the need to resort to proofs.

Apparently, the District Court agreed because, on a record in which the only evidence was that the Department's practices were arbitrary, unreasonable, capricious and operate to deny plaintiffs' due process of law, it held on two occasions that the defendant's agents are acting reasonably when they issue a citation for *any* shortweight condition in a bag of plaintiffs' flour which is in excess of the Table's standards (JA136a; JA325a). Clearly, such a finding cannot stand.

C. *Defendant's contention that proof of a shortweight condition in excess of the standards of the Table establishes a* prima facie *case for violation of the ordinance is incorrect and the District Court's acceptance of this position operates to deny plaintiffs due process of law*

As she did below, defendant contends in her brief that proof that a bag of flour is shortweight in excess of the Table's standards is enough to establish a *prima facie* case of violation of the ordinance and shift to the individual being prosecuted the burden of proving his innocence by introducing evidence that the shortweight condition was

due to permissible causes (DB24). Doubtless, this would be a boon to the Department since it would relieve it of the obligation of introducing relevant evidence of violation and, thereby, lighten its prosecutorial burden. However, such a procedure would clearly operate to deny the person prosecuted due process of law.

As with any other criminal judicial proceeding, the burden of demonstrating the illegality of a shortweight condition of a bag of flour is borne throughout by the prosecution. *See United States v. Kraft Phenix Cheese Corp.*, 18 F. Supp. 60 (S.D.N.Y. 1936) followed in *State v. S. & W. Waldman, Inc.*, 61 N.J. Super. 403, 160 A.2d 677 (Cty. Ct. 1960). No shifting of the burden of proof takes place especially since no statutory presumptions are involved here. Defendant attempts to circumvent this elementary rule by characterizing prosecutions under § 833-16.0 as civil actions to collect a penalty. Defendant's position is clearly contrary to the provisions of § 833-23.0 of the Administrative Code of the City of New York which provides:

> Any person violating any of the provisions of section 833-12.0 through 833-22.0 of the Code, shall be guilty of an offense triable by a magistrate, and upon conviction thereof, shall be fined the sum of not less than twenty-five dollars and not more than two hundred fifty dollars for each offense, or by imprisonment not exceeding ten days, or by both.

Nowhere in Chapter 38, Title A, of the Administrative Code is any mention made of the prosecutions thereunder being the subject of a civil suit.[5]

5. Below, defendant refused to acknowledge that the violations of §833-16.0 could be made the subject of criminal prosecutions [JA287a]. On appeal, defendant has changed her position somewhat. She now admits that §833-23.0 provides for criminal prosecutions, fines and imprisonment for violations of §833-16.0 but states that the Department does not undertake criminal prosecutions in enforcing it (DB6 and footnote).

However, even if it is assumed that the violations of the ordinance are prosecuted in civil actions there still can be no shifting of the burden of proof since the mere fact that a bag of flour is shortweight in excess of the Table's standards is not any proof of a violation of the ordinance, much less *prima facie* proof thereof. This is because the Table may be used to assess the legality of only one of the two permissible shortweight conditions: deviations due to packaging error. It makes no attempt to consider the second permissible shortweight condition, that due to variations as a result of the loss of moisture content.[6] Thus, while it is perfectly proper for defendant's agents to assess the legality of shortweight conditions in packages of *non-hygroscopic* commodities solely by means of reference to the Table, such procedure is improper and unreasonable when packages of hygroscopic substances are involved, thus, the Table cannot be evidence of a violation of the ordinance.

D. *To subject plaintiffs or their retailers to repeated criminal prosecution under the ordinance would be a denial of due process of law*

Defendant has repeatedly urged that the arguments advanced by plaintiffs in this litigation would be more properly made in the defense of prosecutions for alleged violations of the ordinance. As of this writing there are several hundred citations outstanding with more coming in every week. To require plaintiffs or their retailers to defend each of these alleged violations as they arise, and interpose in a court of limited jurisdiction the arguments now made, would be incredibly vexatious and

6. The only shortweight conditions which are permissible are those reasonable deviations due to packaging errors or those variations due to loss of moisture content. Plaintiffs do not seek to exempt leaking or damaged bags from operation of the ordinance as defendant seems to contend at page 20 of her brief.

oppressive. It would be much more sensible and economical for them to merely pay the fine and be done with it. The procedure urged by defendant would place an intolerable burden upon the vindication of plaintiffs' rights and operate to deny them due process of law. *Cf. Broderick v. Rosner*, 294 U.S. 629 (1934).

E. *Suggested proper administrative procedures*

In place of the unconstitutional administrative procedures which the Department presently employs, plaintiffs have suggested in their original brief (PB20-22) a method of enforcing the ordinance which would be in consonance with the requirements of due process. This suggested method has been scoffed at by defendant who characterizes it as "cumbersome" and "absurd" (DB10, 25). However, defendant cites no evidence of record to support her contention that the suggested method is unworkable, preferring instead to rely merely upon the comments of her own counsel during the summary judgment motion.

Plaintiffs have also suggested that the quality-control records kept with reference to each bag of their flour could be of considerable help to the Department in the proper enforcement and administration of the ordinance. When, however, plaintiffs point out that these records can be easily retrieved through the use of a code number on each bag, defendant resorts to misstating the record to detract from the suggestion. At page 12 of her brief defendant indicates that William Johnson, plant manager of General Mills' Buffalo, New York, facility, was shown two bags of flour and asked to state the code number of each. Defendant then asserts that Johnson had difficulty locating the code number on the first bag and could not decipher the meaning of the number on the second. In fact, only

one bag of flour was ever shown to the witness; that was Defense Exhibit DA, a five-pound bag of Gold Medal flour.[7] This bag of flour was handled so roughly by defendant's counsel that it was extremely difficult to locate its code number. As plaintiffs' counsel observed, King Kong could not have done a better job of mishandling the bag (JA233a).

The code number which defendant alleges Johnson was unable to decipher, however, was not contained on a bag of flour. Rather, it was illegibly written on a Package Control Report prepared by a Department inspector (Exhibit D to the Answer, JA45a). An examination of the record discloses that some of the Code numbers on the report were accurately transcribed and, therefore, easily decoded; others apparently, were not accurately transcribed and, therefore, not capable of being decoded. In any event, nothing defendant has ever presented controverts the fact that there are code numbers printed on each package of flour, that the code can be easily discerned and that the information resulting from decoding will lead to the prompt retrieval of the quality-control records on that package.

The suggested method of enforcement advanced by plaintiffs constitutes nothing more than a restatement of the quoted procedures for assessing shortweights of hygroscopic commodities outlined by Handbook 67 (JA357a-58a quoted at PB20-21). Should the Court be of the opinion that the procedures set forth in Handbook 67 require too much subjective evaluation on the part of the individual weights-and-measures inspector, it is suggested that his investigation can be made more objective by employing

7. The procedure by which this bag of flour was made part of the record was unusual to say the least. It was introduced into evidence (without any foundation having been laid) during the cross-examination of one of the witnesses on plaintiffs' case (JA231a).

the following procedures: the first step in the enforcement of the ordinance should be the ascertaining of the moisture content of the package of flour found to be shortweight. This is done by use of the "Vacuum Oven Method" prescribed by Federal regulations (21 C.F.R. §15.1(c)(3)). Once the moisture content is established, that fact in conjunction with other information available to the inspector will permit him to make a simple calculation to determine the weight of the flour at the time of packing. If the calculation indicates that the quantity-of-contents of the suspect package was equal to or in excess of stated-net weight at the time of packing, then, the inspector, by reference to the data developed by Anker, Geddes and Bailey, will be able to determine objectively whether the particular variation from stated-net weight was a reasonable variation "caused by loss . . . of moisture during the course of good distribution practice." Plaintiffs would certainly welcome such a standard since, as matters now stand, their businesses are subject to the whims and caprices of the various local enforcement agencies.

POINT III

Because §833.16.0 imposes a labeling requirement upon plaintiffs' bags of wheat flours which is different from the labeling requirements under Federal law, it is preempted by Federal law.

In her brief defendant makes the following assertion:

> [I]n judging unreasonable shortweights, the City does not substitute its own standards for Federal standards. . . . To the contrary, the City imposes the Federal standards and requires no more than that the product conform to the Federal standard *at the time of sale*. [DB34-35].

Were this assertion true, this litigation would not have been necessary since plaintiffs' bags of flour are labeled in accordance with Federal law at all times: when packed, when shipped and when sold. While it is true that the actual weights of some bags of plaintiffs' flour will from time-to-time, fall below stated-net weight when held on retailers' shelves, there was no proof presented to the trial court that the shortweight conditions involved here were in violation of Federal law.

The fact of the matter is that through enforcement of the ordinance, the City has imposed a labeling requirement on bags of plaintiffs' flours which is "different from" Federal labeling requirements. The municipal requirement, as administratively applied, is that the weight-of-contents of such bags must fall within the standards of the Table when offered for sale. In addition to being arbitrary and unreasonable this requirement would necessitate the reweighing of each bag from time-to-time and, if the weight of the bag is then below the arbitrary and unrelated standard of the Table, the placing and frequent revision of an additional statement of quantity-of-contents on the label to reflect its net weight at that time.

What is the purpose of this municipal labeling scheme? Defendant would have this Court believe that the ordinance achieves two goals: (1) it creates "an informed consumer public able to make accurate value comparisons between products" (DB39); and (2) it makes "certain that consumers receive a reasonable amount of the nutritional dry ingredients in the 'five-pound' bag of flour" (DB26). Clearly, neither of these aims is achieved or advanced by the ordinance, as enforced.

Imposing a minimum-weight labeling program as the defendant's proposed construction of the ordinance does,

would require that the label on plaintiffs' bags of wheat flours contain at least two separate statements of quantity-of-contents. This would only serve to confuse the consumer rather than inform him with regard to value comparisons. In addition, it would surely destroy the simple net-quantity-of-content-labeling program fostered by Federal legislation and regulations.

Nor can it be argued (and it certainly was not proven) that the second purpose has been or will ever be achieved by this ordinance. It is an irrefutable scientific fact that regardless of the loss of moisture content (which is all that is reflected by the second statement of quantity-of-contents) the amount of nutritional dry contents in the bag does not vary (JA171a). As the Attorney General stated in his amicus curiae brief in *General Mills, Inc., et al. v. Jones*, cited in plaintiffs' earlier brief, "In the case of packaging and labeling flour, an unthinking insistence on accurate labeling of weight at the time of retail sale does not necessarily best serve the needs of consumers" (PB28).

The ordinance, as administered, imposes upon plaintiffs' bags of flour a content-labeling requirement which clearly differs from the content-labeling requirement under Federal law. As such it runs afoul of the express Congressional mandate that all local laws which require labeling information "different from" the requirements of 15 U.S.C. §1453 are superseded (15 U.S.C. §1461). Moreover, there is no palpable benefit to the consumer from the existence of this local requirement which would justify withholding application of the doctrine of preemption.

The regulation of labeling is a complex area of the law. Congress has expended much time and energy in creating a simple yet comprehensive labeling scheme. While there may exist some area for local participation in this field, if nothing else, this case demonstrates that quan-

tity-of-contents labeling is not one of them. The need for uniformity should be obvious to all. This is due, in part at least, to the fact that Federal, State and local laws tend to focus on different points in the distribution channel: *i.e.*, when the commodity is placed in interstate commerce, when it is placed in intrastate commerce and when it is placed on the retailer's shelf for sale. If a different labeling requirement exists at each stage of distribution chaos will result. Because §833-16.0 imposes a further and different quantity-of-contents labeling requirement upon hygroscopic commodities at the time they are offered for retail sale, it must yield to paramount Federal law.

Point IV

The ordinance, as administered, constitutes an unreasonable burden on interstate commerce.

Whether §833-16.0, as enforced, imposes an unconstitutional burden on the activities of plaintiffs beyond the borders of New York City depends upon the resolution of the question of whether the ordinance exceeds the limits necessary to vindicate a legitimate local iterest. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

The local interest sought to be advanced by the ordinance is that of the New York City consumer. Defendant strives to convince the Court that the ordinance is a bulwark against the fraudulent and deceptive labeling practices of plaintiffs (DB26-29). However, her success in this endeavor must necessarily be severely limited by the record which is barren of evidence demonstrating that plaintiffs have engaged in any fraudulent or deceptive practices. In-

deed, the proofs show plaintiffs to package and label their product, a hygroscopic commodity, in accordance with the Federal law. Moreover, as pointed out in Point III, *supra*, the ordinance, as enforced, adds nothing whatsoever to the existing Federal regulatory scheme which can be said to advance the interest of the New York City consumer by value comparisons or ensuring "that consumers receive a reasonable amount of the nutritional dry contents in a 'five-pound' bag of flour."

The ordinance simply requires plaintiffs to do a meaningless act, which, according to the Attorney General of the United States, violates Federal law. When plaintiffs justifiably balk at doing this they become the object of harassment by defendant's agents. Clearly §833-16.0 represents an unconstitutional burden on interstate commerce and must be struck down.

CONCLUSION

Time and time again in her brief defendant resorts to the use of certain current shibboleths in an attempt to wrap herself in the flag of consumer protectionism and to portray plaintiffs as villains bent upon gouging an unsuspecting public. This tactic may have a certain currency and emotional appeal in some circles but it is unavailing in a court of law. It is a tactic of last resort to which defendant has been driven, no doubt, by a record which is bereft of any evidence supporting the position she has taken. Defendant fails to posit a single cogent reason grounded in the evidence which would justify the existence of the ordinance or the administrative practices indulged in by the Department in enforcing it. Plaintiffs, on the other hand, amply demonstrated the unconstitutionality of both. For this reason, it is submitted that the Orders appealed from must be vacated and judgment entered on behalf of plaintiffs.

Respectfully submitted,

/s/ William J. Condon
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Civil Appeal
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Defendant-Appellee.

STATE OF NEW JERSEY :
ss.
COUNTY OF ESSEX :

AFFIDAVIT OF SERVICE

JAMES R. LAMB, being duly sworn, according to law, upon his oath deposes and says:

1. I am an associate with the firm of Carpenter, Bennett & Morrissey, Esqs. who are of counsel to appellants in the above-entitled action.

2. On Friday, December 20, 1974, I served two copies of Reply Brief of Plaintiffs-Appellants on Adrian P. Burke, Esq., Corporation Counsel for the City of New York, Municipal Building, New York, New York 10007, attorney for appellee, by mailing same in a sealed envelope, properly addressed, postage prepaid, Certified Mail, Return Receipt Requested, at the United States Post Office, Woodbridge, New Jersey.

James R. Lamb

James R. Lamb

Sworn and subscribed to
before me this day
of December, 1974

Margaret F. McDonnell

Margaret F. McDonnell

MARGARET F. McDONNELL
[illegible] New Jersey
My Commission Expires Mar 12, 1978

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